No. 02-750

Supreme Court, U.S.
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In The
Supreme Court of the United States

ROGERS MACHINERY CO., INC.,

Petitioner,

v.

CITY OF TIGARD, AND
WASHINGTON COUNTY,

Respondents.

**On Petition For A Writ Of Certiorari
To The Oregon Court Of Appeals**

BRIEF OF *AMICUS CURIAE* TEXAS JUSTICE FOUNDATION IN SUPPORT OF THE PETITION

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QUESTION PRESENTED

1. Whether, under the Takings Clause, the test of *Dolan v. City of Tigard*, 512 U.S. 374 (1994), applies to a monetary exaction on land development imposed pursuant to a legislative scheme?

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INTEREST OF *AMICUS CURIAE*

This brief *amicus curiae* in support of the petition is submitted pursuant to Rule 37 of the Rules of this Court.[1] Petitioner and respondents have consented to the filing of this brief, and their consent letters have been filed with the Clerk of this Court.

Amicus is the Texas Justice Foundation, a public interest legal institute that seeks to protect, through litigation and education, fundamental freedoms and rights essential to the preservation of American society. *Amicus* is especially concerned that doubtful and conflicting precedents under the United States Constitution's Takings Clause will undermine the protections of that Clause.

SUMMARY OF ARGUMENT

This case raises two important issues about how to apply the test of *Dolan v. City of Tigard*, 512 U.S. 374 (1994), to land development exactions. The first issue over which courts have split is whether *Dolan* applies to monetary exactions or whether it applies only where the government has required a physical dedication of land.

The second issue over which courts have split is whether *Dolan* applies to so-called "legislative" exactions, or whether its application is restricted to so-called "adjudicative" exactions. Two members of this Court noted

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

the existence of this split over seven years ago in *Parking Ass'n of Georgia, Inc. v. City of Atlanta*, 515 U.S. 1116 (1995) (Thomas, J., joined by O'Connor, J., dissenting from denial of cert.). The split has only worsened since, and should at long last be resolved by this Court.[2]

Moreover, the court below erred in three important ways. It erroneously held that fees are subject to lower scrutiny under *Dolan* than are physical dedications, even though this Court's jurisprudence makes it clear that fees should receive the same scrutiny. It erroneously held that the fee levied on Rogers Machinery was "legislative" merely because a generally applicable and non-discretionary statute authorized it, even though adjudications almost always involve the construal and application of some such statute. And it erroneously held that *Dolan* does not apply to so-called "legislative" enactments, even though there is no constitutional reason to make such a distinction and, as experience shows, no predictable way to distinguish "legislation" from "adjudication" in the local land-use context.

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[2] As Justice Thomas pointed out, the "confused nature" of the Court's takings jurisprudence and the "fact-specific nature" of takings claims has counseled the granting of certiorari where the lower court had simply misapplied a prior Court precedent. *Id.* (citing, *e.g.*, *Dolan*, 512 U.S. at 383); *see also City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999) (granting certiorari to determine whether the lower court properly applied *Dolan*). Where not only one but two conflicts present themselves in a single case, review by this Court is all the more desirable.

ARGUMENT

I. The Circuits and State Courts Are Divided Over Whether to Apply *Dolan* to Fees and to Legislative Enactments

A. Fees

Courts have split over whether to apply *Dolan* to fees imposed on new land development. Some courts have held that *Dolan* and/or *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), do apply to such fees. *See, e.g., San Remo Hotel L.P. v. San Francisco*, 41 P.3d 87, 102-03 (Cal. 2002); *Town of Flower Mound v. Stafford Estates*, 71 S.W.3d 18, 31-34 (Tex.App.-Fort Worth, 2002); *Ehrlich v. City of Culver City*, 911 P.2d 429, 443-44 (Cal. 1996); *Northern Ill. Home Builders Ass'n v. County of Du Page*, 649 N.E.2d 384, 388-90 (Ill. 1995); *Trimen Dev. Co. v. King County*, 877 P.2d 187, 194 (Wash. 1994); *Lexington-Fayette Urban County Gov't v. Schneider*, 849 S.W.2d 557, 559-60 (Ky. Ct. App. 1992) (applying *Nollan*); *see also Christopher Lake Dev. Co. v. St. Louis County*, 35 F.3d 1269, 1275 (CA8 1994).

On the other hand, several state and federal courts have reasoned that *Dolan* applies only to physical dedications of land. *See, e.g., Garneau v. City of Seattle*, 147 F.3d 802, 812 (CA9 1998); *Texas Manufactured Housing Ass'n v. Nederland*, 101 F.3d 1095, 1105 (CA5 1996); *Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1578-79 (CA10 1995); *Homebuilders Ass'n of Central Arizona v. City of Scottsdale,* 930 P.2d 993, 1000 (Ariz. 1997); *McCarthy v. City of Leawood*, 894 P.2d 836, 845 (Kan. 1995).

Some of the confusion is due to a dictum in *City of Monterey, supra*, where the Court noted that *Dolan* applied only to "exactions – land-use decisions conditioning approval of development on the *dedication of property* to

public use." 526 U.S., at 702 (emphasis added). Some courts rely on this language to hold that *Dolan* does not apply to fees, *see, e.g.*, *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 697 (Colo. 2001), while other courts take an opposite view, *see, e.g.*, *Town of Flower Mound*, 71 S.W.3d at 31-32; *Benchmark Land Co. v. City of Battleground*, 14 P.3d 172, 173-75 (Wash. Ct. App. 2000).

B. Legislative Acts

Many courts have held that legislative acts are not subject to *Dolan*'s heightened scrutiny. *See, e.g.*, *Harris v. City of Wichita*, 862 F. Supp. 287, 294 (D. Kan. 1994); *San Remo Hotel*, 41 P.3d at 104; *Ehrlich*, 911 P.2d at 447 (observing in dicta that *Dolan* need not apply to "generally applicable" fees); *Pringle v. City of Wichita*, 917 P.2d 1351, 1357 (Kan. Ct. App. 1996); *Arcadia Dev. Corp. v. City of Bloomington*, 552 N.W.2d 281, 286 (Minn. Ct. App. 1996); *Scottsdale*, 930 P.2d at 1000; *Southeast Cass Water Resource Dist. v. Burlington Northern R.R. Co.*, 527 N.W.2d 884, 896 (N.D. 1995); *Parking Ass'n of Georgia, Inc. v. City of Atlanta*, 450 S.E.2d 200, 203 n.3 (Ga. 1994); *Waters Landing Ltd. Partnership v. Montgomery County*, 650 A.2d 712, 724 (Md. 1994).

On the other hand, several courts have applied *Dolan/Nollan* to legislative acts. *See, e.g.*, *Amoco Oil Co. v. Village of Schaumburg*, 661 N.E.2d 380, 389-90 (Ill. App. Ct. 1995); *Manocherian v. Lenox Hill Hosp.*, 643 N.E.2d 479, 482-85 (N.Y. 1994) (applying *Nollan* to statute requiring landlords to offer lease renewals to non-profit hospitals);

Kottschade v. City of Rochester, 537 N.W.2d 301, 307-08 (Minn. Ct. App. 1995).[3]

C. This Case Squarely Presents a Conflict on Both Issues

The case below squarely presents both issues. The Oregon Court of Appeals held that *Dolan* may apply to fees, but "*only* when the exaction has been imposed through an adjudicatory process." *Rogers Machinery Co. v. City of Tigard*, 45 P.3d 966, 977 (Or. Ct. App. 2002) (emphasis in original). The Oregon Supreme Court denied review without modifying any aspect of the lower court's decision. *Rogers Machinery Co. v. City of Tigard*, 52 P.3d 1057 (Or. 2002). Thus, both issues on which splits have occurred are presented in this case – ripe for this Court's resolution.

II. The Decision Below Was Incorrect

A. The Court Below Erred in Concluding that Fees Receive Less Scrutiny Under *Dolan*

This Court's previous actions make it clear that *Dolan* applies to fees as much as to physical dedications. First, the Court remanded *Ehrlich v. City of Culver City*, 15 Cal. App. 4th 1737, 19 Cal. Rptr. 2d 468 (Cal. App. 2d Dist.

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[3] Another court applied *Dolan* to an ordinance requiring an easement for fire prevention purposes, but stated that it would "assign weight to the fact that the easement requirement derives from a legislative rule of general applicability and not an ad hoc determination made by the planning board at the time of the pending application." *Curtis v. Town of South Thomaston*, 708 A.2d 657, 660 (Me. 1998).

1993), for reconsideration in light of *Dolan*. *See* 512 U.S. 1231 (1994). And *Ehrlich* involved a statute requiring a fee, not a physical dedication. 15 Cal. App. 4th at 1742, 19 Cal. Rptr. 2d at 470. The Court's remand in *Ehrlich* "would have been an unnecessary waste of judicial resources" if *Dolan* did not apply to fees. *See Garneau*, 147 F.3d at 819 (O'scannlain, J., concurring and dissenting in part).

Second, *Dolan* itself surveyed many state court cases for guidance on the appropriate standard. *See Dolan*, 512 U.S. at 389 ("Since state courts have been dealing with this question a good deal longer than we have, we turn to representative decisions made by them."). Notably, many of the cases surveyed involved *fees* in lieu of physical dedications, indicating that the *Dolan* Court itself saw no meaningful distinction between physical dedications and fees in lieu thereof.[4]

Moreover, to apply *Dolan* to dedications but not fees would enormously complicate those cases in which local governments use *both* types of exactions, either simultaneously or as alternative options. As one court observed, the result would be a needlessly difficult form of "bifurcated review." *Town of Flower Mound*, 71 S.W.3d at 33 (citing as an example *Art Piculell Group v. Clackamas County*, 922 P.2d 1227, 1230 (Or. Ct. App. 1996)).

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[4] The fee-in-lieu cases cited by *Dolan*, 512 U.S. at 389-91, include *Jenad, Inc. v. Village of Scarsdale*, 218 N.E.2d 673, 675-76 (N.Y. 1966); *Divan Builders, Inc. v. Planning Bd. of Twp. of Wayne*, 334 A.2d 30, 33 (N.J. 1975); *City of College Station v. Turtle Rock Corp.*, 680 S.W.2d 802, 804 (Tex. 1984); *Call v. City of West Jordan*, 606 P.2d 217, 218 (Utah 1979); and *Jordan v. Village of Menomonee Falls*, 137 N.W.2d 442, 445 (Wis. 1965).

Most importantly, fees in exchange for development permits are the functional equivalent of physical dedications. As Judge O'scannlain has said, to treat fees and dedications differently "could lead to an absurd result: whereas a government would be constitutionally unable to pass a law forbidding landlords from evicting their tenants, the government could presumably accomplish the same goal . . . by simply passing a law requiring landlords to pay evicted tenants an exorbitant amount of money." *Garneau*, 147 F.3d at 821 (O'scannlain, J., concurring and dissenting in part); *see also Benchmark Land Co.*, 14 P.3d at 175 ("If the government in *Nollan* and *Dolan* had exacted money rather than land and then purchased land to solve the problems, the same questions would arise. . . . ").

In short, nothing in this Court's jurisprudence requires that fees should receive lower scrutiny. To apply lower scrutiny in such cases would ultimately facilitate the circumvention of *Dolan*, and complicate Takings Clause jurisprudence even further.[5]

B. The Court Below Erred in Concluding that the Fee Here was Legislative Rather Than Adjudicative

The Oregon Court of Appeals relied on two erroneous factors in determining that this case did not involve an

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[5] It may well be, as some have argued, that a fee system is superior to a physical dedication system in that it can be more closely tailored to the impacts of any given development. Carlson & Pollak, *Takings on the Ground: How the Supreme Court's Takings Jurisprudence Affects Local Land Use Decisions*, 35 U.C. Davis L. Rev. 103, 137-38 (2001). But the fact that fees might more readily satisfy the *Dolan* test is no reason to hold that the *Dolan* test doesn't even apply.

"adjudication": The lack of administrative "discretion," and the "generally applicable" nature of the underlying law. Neither factor ought to be relevant.

Discretion – The court found much significance in the fact that the ordinance makes imposition of the Traffic Impact Fee "mandatory on 'all development in the county,'" *Rogers Machinery*, 45 P.3d at 980, and that "no significant discretion is involved in the TIF's imposition or calculation." *Id.*, at 981. What little discretion the administrators had, said the court, was not enough to convert the fee into "the kind of ad hoc adjudicatory decision that troubled the Court in *Dolan*." *Id.*, at 981 n.17.[6]

It is not clear, however, why the amount of discretion afforded to administrators has anything to do with whether a governmental action should be classified as legislative or adjudicative. By analogy, the United States Sentencing Guidelines severely limit the discretion afforded to trial judges, but this does not mean that criminal trials are no longer adjudications. The level of discretion possessed by the adjudicator is simply irrelevant to the legislative/adjudicative distinction.[7]

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[6] *See also, e.g.*, *San Remo Hotel*, 41 P.3d at 104 (noting that the administrative body had no "discretion as to the imposition or size" of an exaction); *Krupp*, 19 P.3d at 695 (refusing to apply *Dolan* where the fee was not "discretionary"); *Homebuilders Ass'n v. City of Scottsdale*, 902 P.2d 1347, 1351 (Ariz. Ct. App. 1995) ("While *Dolan* also involved a city ordinance, the crucial distinction lies in the amount of adjudicative, staff-level discretion permitted by each ordinance").

[7] A further problem is that there is no way to specify *just how much* discretion would convert legislation into adjudication. As one commentator notes, surveys have shown that in roughly a third of all exactions nationwide, the administrator has some varying level of

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Generally applicable law – The Oregon court heavily relied on the fact that the fee is "imposed on broad classes of property," *Rogers Machinery*, 45 P.3d at 980, that it is "generally applicable," *id.*, at 981, and that it is "uniformly applied." *Id.*, at 981.[8]

Again, criminal law is generally applicable, but that does not prevent a criminal trial from being an adjudication. What characterizes an adjudication is that a pre-existing *law* (whether generally applicable or not) has been *applied* to a specific individual by a court, commission, or administrator.

As it now stands, the Oregon Court of Appeals and other lower courts apparently think that adjudications exist only where the adjudicator has free-wheeling authority to issue ad hoc decisions unconstrained by anything other than his own imagination. Such a view is anomalous. In almost *all* adjudications outside of the common law context, the adjudicator applies some law or regulation to a specific person. How broadly that law or regulation sweeps, or how much discretion it affords the adjudicator, are simply irrelevant.

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flexibility. Inna Reznik, *The Distinction Between Legislative and Adjudicative Decisions in* Dolan v. City of Tigard, 75 N.Y.U. L. Rev. 242, 265 (2000).

[8] *See also, e.g.*, *San Remo Hotel*, 41 P.3d at 104 (noting that the government did not "single out" the plaintiffs); *Krupp*, 19 P.3d at 698 (refusing to apply *Dolan* where the fee was not "unique" to the plaintiffs).

C. The Court Below Erred in Concluding That *Dolan* Should Not Apply to Legislative Enactments

1. No Branch of Government is Exempt from the Takings Clause

From the earliest cases incorporating the Bill of Rights against the States, this Court has consistently held that a state may not avoid constitutional obligations by acting through one branch of government rather than another. In the very case that this Court always cites as incorporating the Takings Clause – *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226 (1897)[9] – the Court stated that the Takings Clause applies "to all the instrumentalities of the State, to its legislative, executive and judicial authorities," and that this "must be so, or, as we have often said, the constitutional prohibition has no meaning, and 'the State has clothed one of its agents with power to annul or evade it.'" *Id.*, at 233-34 (quoting *Ex Parte Virginia*, 100 U.S. 339, 346-47 (1879)); *see also Scott v. McNeal*, 154 U.S. 34, 45 (1894) (holding that the Fourteenth Amendment applies to "all acts of the State, whether through its legislative, its executive or its judicial authorities.").[10]

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[9] *See, e.g., Dolan*, 512 U.S. at 384 n.5 (discussing Court's reliance on *Chicago* for incorporation). Note that an earlier case had apparently already incorporated the Takings Clause via the Equal Protection Clause. *See Reagan v. Farmers' Loan & Trust Co.*, 154 U.S. 362, 399 (1894).

[10] Ironically, the dispute in *Chicago* was the precise opposite of the current dispute: On the unquestioned assumption that the Takings Clause applied to legislative action, the Court had to decide whether

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If this were a procedural Due Process case, and the question were whether Rogers Machinery deserved notice and opportunity for a hearing, then it would be relevant whether the government had acted via legislation or adjudication.[11] Unlike the Due Process Clause, however, the Takings Clause applies regardless of the form of government action, requiring compensation *whenever* the government takes private property for a public purpose.

Thus, all other Takings Clause tests apply with equal force to legislative action. If a state legislature, for example, passes a law requiring that an apartment building provide space for a cable box, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982), or that "denies all economically beneficial or productive use of land," *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992), or that goes "too far" in regulating land use, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), a compensable taking will have occurred. And if an administrative agency (acting in a quasi-legislative capacity) establishes confiscatory rates, it too will violate the Takings Clause. *See, e.g., Duquesne Light Co. v. Barasch*, 488 U.S. 299, 308 (1989).

In an oft-quoted statement, this Court has said that the purpose of the Takings Clause is to "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the

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state *adjudicative* action could violate the Takings Clause as well. *Chicago*, 166 U.S. at 236, 241.

[11] *Compare Londoner v. City of Denver*, 210 U.S. 373 (1908), *with Bi-Metallic Investment Co. v. State Bd. of Equalization of Colorado*, 239 U.S. 441 (1915).

public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).[12] The mere fact that a particular exaction is authorized by a statute does not prevent it from imposing an unfair burden on a given citizen.[13] As Justice Thomas has said, "A city council can take property just as well as a planning commission can." *Parking Ass'n of Georgia*, 515 U.S., at 1116 (Thomas, J., joined by O'Connor, J., dissenting from denial of cert.). *Cf.* Carlson & Pollak, *Takings on the Ground: How the Supreme Court's Takings Jurisprudence Affects Local Land Use Decisions*, 35 U.C. Davis L. Rev. 103, 131 (2001) (noting empirically that developers in some towns "may face excessive exactions whether or not the exactions are legislative enacted or applied on an ad hoc basis").[14]

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[12] *See also Monongahela Nav. Co. v. United States*, 148 U.S. 312, 325 (1893) (stating that the Takings Clause "prevents the public from loading upon one individual more than his just share of the burdens of government").

[13] As one scholar has said, "it should matter little whether a particular land-use regulation originates with a legislative or an adjudicative pronouncement. What counts is whether the legislative determination has been brought to bear on particular property, either through the permitting and rezoning process or through initial mapping and classification." Kmiec, *Private Property and the Future of Government Regulation: Inserting the Last Remaining Pieces into the Takings Puzzle*, 38 Wm. & Mary L. Rev. 995, 1041-42 (1997).

[14] As an Illinois court has observed, a local government may not "skirt its obligation to pay compensation when taking private property for public use merely by having the Village Board of Trustees pass an 'ordinance' rather than having a planning commission issue a permit." *Amoco Oil Co.*, 661 N.E.2d at 389. The government "should not be able to insulate itself from a takings challenge merely by utilizing a different bureaucratic vehicle when expropriating its citizen's property." *Id.*, at 390.

The Oregon Court of Appeals reasoned, however, that legislation bears a lower risk of "extortion" than does adjudication.[15] Relying on a California case, the court theorized that generally applicable legislation would not be likely to result in "extortionate fees for all property development," because any such proposal would "face widespread and well-financed opposition." *Rogers Machinery,* 45 P.3d at 982 (quoting *San Remo*, 41 P.3d at 105). "Ad hoc individual monetary exactions deserve special judicial scrutiny mainly because, affecting fewer citizens and evading systematic assessment, they are more likely to escape such political controls." *Id.* (quoting *San Remo*, 41 P.3d at 105).

But this reasoning is unsupported. For example, in a densely-built area where most possible development has already occurred, a legislative exaction might easily place an unfair burden on the minority of developments that are new. Moreover, ad hoc monetary exactions might well be *more* fair because they can theoretically be more readily tailored to the impact of individual developments. Indeed, the petitioners here would be far better off if the City of Tigard had used a more ad hoc process that tailored the traffic fee to the actual level of increased traffic – which is to say, zero. *See* Pet. for Cert. at 15-16. And even if broadly-sweeping legislative enactments are less likely to be extortionate than narrow legislation or seat-of-the-pants adjudication, that is no reason to abandon judicial scrutiny where the application of such a law *is* extortionate. (Here as

[15] In other words, the court appeared to think that the Takings Clause applies not to takings per se, but only to those governmental processes that are assumed to be likely to produce takings.

elsewhere, it is completely counterintuitive to hold that where *Dolan* might be more easily satisfied, it should therefore not apply at all.)

The applicability of *Dolan* should not rest on such unsupported speculation about the political process. As Justice Thomas has said, "the general applicability of the ordinance should not be relevant in a takings analysis. . . . The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference." *Parking Ass'n of Georgia*, 515 U.S., at 1116 (Thomas, J., joined by O'Connor, J., dissenting from denial of cert.) No other Takings Clause test applies only to one branch of government – and no persuasive reason exists for *Dolan* to be the sole exception.

2. The Legislative/Adjudicative Distinction is Unworkable and Irrelevant.

The line between legislative and adjudicative actions is notoriously difficult to draw. As the Fifth Circuit has said, there is no "*a priori* basis . . . for distinguishing legislative from adjudicative acts." *Shelton v. City of College Station*, 780 F.2d 475, 480 (CA5 1986); *see also id.*, at 481 (noting that a "state may choose to make a legislative decision [regarding zoning] by a process that resembles adjudication. . . . ").

A formal approach – looking at the particular governmental body responsible for an exaction – would be completely unworkable. By long-standing tradition, local governments do not have to abide by separations of powers principles. *See, e.g., Dreyer v. Illinois*, 187 U.S. 71, 83-84 (1902) ("Whether the legislative, executive and judicial

powers of a State shall be kept altogether distinct and separate . . . is for the determination of the State."); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461 n.6 (1981) ("The states are free to allocate the lawmaking function to whatever branch of state government they may choose."). The result is that "the states enjoy complete hegemony over local governments." Briffault, *Our Localism: Part I – The Structure of Local Government Law*, 90 Colum. L. Rev. 1, 7 (1990).

Most states do not in fact require that local governments be separated into the traditional three branches. *See, e.g.*, Hershkoff, *State Courts and the 'Passive Virtues': Rethinking the Judicial Function*, 114 Harv. L. Rev. 1833, 1884-86 (2001); Reznik, *The Distinction Between Legislative and Adjudicative Decisions in* Dolan v. City of Tigard, 75 N.Y.U. L. Rev. 242, 260-61 (2000). As one scholar observed, "Local government is marked by a profusion of boards, commissions, and authorities that combine legislative and executive authority over various governmental functions." Briffault, *Who Rules at Home?: One Person/One Vote and Local Governments*, 60 U. Chi. L. Rev. 339, 348-49 (1993). Similarly, this Court has observed that local governments usually "cannot easily be classified in the neat categories favored by civics texts." *Avery v. Midland County*, 390 U.S. 474, 482 (1968).[16]

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[16] *Cf.* Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 Cal. L. Rev. 839, 846 (1983) (stating that " 'legislative' [and] 'judicial' . . . rubrics are drawn from a separation-of-powers doctrine more appropriate to larger governmental units").

A functional distinction – by which legislation is generally applicable and forward-looking while adjudication is particularized and retrospective[17] – has not proven any more workable in practice. For example, rezonings – which may trigger exaction requirements – are prospective in effect but often particular in application. Thus, the States have generally disagreed on how to classify such decisions. Compare *Fasano v. Bd. of County Comm'rs*, 507 P.2d 23, 26 (Or. 1973) (characterizing a zone amendment as adjudicative), *with Arnel Dev. Co. v. City of Costa Mesa*, 620 P.2d 565, 569 (Cal. 1980) (characterizing a zone amendment as legislative); *see also* Hansen, *Quasi-Judicial Land-Use Decision Making in New Castle County*, 4 Del. L. Rev. 191, 206 (2001) (observing that "courts are inconsistent, nationwide, in their determinations of which land-use decisions made by legislative bodies are quasi-judicial in nature"); *Id.* at 205 (noting that courts "sometimes classify rezonings as legislative and sometimes as quasi-judicial decisions").[18]

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[17] *See United States v. Florida East Coast Railway Co.*, 410 U.S. 224, 245 (1973); *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226 (1908) ("A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. . . . Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.").

[18] Sometimes the same court issues conflicting decisions on this question. Compare, *e.g.*, *Board of County Comm'rs v. Snyder*, 627 So.2d 469, 474-75 (Fla. Dist. Ct. App. 1993) (deeming rezoning "quasi-judicial"), *with Board of County Comm'rs v. Karp*, 662 So.2d 718, 719-20 (Fla. Dist. Ct. App. 1995) (deeming a rezoning a "legislative" action).

In fact, state and federal courts often disagree on how to characterize a single state's zoning decisions.[19] Many courts resort to the terms "quasi-adjudicative" or "quasi-legislative."[20] The use of such terminology is, in the famous words of Justice Jackson, "implicit with confession that all recognized classifications have broken down, and 'quasi' is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed." *FTC v. Ruberoid Co.*, 343 U.S. 470, 487-488 (1952) (Jackson, J., dissenting).

3. The *Dolan* Court's Concerns Are More Readily Addressed by a Facial/As-Applied Distinction

The question remains, if a legislative/adjudicative distinction is unworkable, then what did the *Dolan* Court

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[19] *Compare FM Properties Operating Co. v. City of Austin*, 93 F.3d 167, 174 (CA5 1996) (holding that "land-use decisions" are "'quasi-legislative' in nature"); *Shelton*, 780 F.2d at 479 (same), *with Town of Flower Mound*, 71 S.W.3d at 35 (specifically rejecting *Shelton* and holding that Texas law deems development approval a "quasi-judicial function").

[20] *See, e.g., New Port Largo, Inc. v. Monroe County*, 95 F.3d 1084, 1091 (CA11 1996) (noting that a zoning commission is a "quasi-legislative body"); *Bannum, Inc. v. City of Louisville*, 958 F.2d 1354, 1360 (CA6 1992) ("Zoning is a quasi-legislative function. . . . "); *Smithfield Concerned Citizens for Fair Zoning v. Town of Smithfield*, 907 F.2d 239, 244 (CA1 1990); *Landgate, Inc. v. California Coastal Comm'n*, 953 P.2d 1188, 1198 (Cal. 1998) (characterizing denial of permit as "quasi-adjudicative"); *County of Lancaster v. Mecklenburg County*, 434 S.E.2d 604, 612 (N.C. 1993) (deeming variances, special and conditional use permits, and appeals of administrative determinations "quasi-adjudicative").

The 10th Circuit splits the difference, characterizing zoning decisions as "quasi-legislative or quasi-judicial." *Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence*, 927 F.2d 1111, 1119 (CA10 1991).

mean? Recall that the Court in *Dolan* distinguished earlier cases applying a lower brand of scrutiny on the grounds that they "involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel." *Dolan*, 512 U.S. at 385. The Court also reasoned that the city bore the burden of demonstrating constitutionality because it had "made an adjudicative decision to condition petitioner's applications for a building permit on an individual parcel." *Id.*, at 391 n.8.

It is not entirely clear, however, what the *Dolan* Court actually meant by making the legislative/adjudicative distinction. As Justice Souter pointed out in his dissent, "the majority characterizes this case as involving an 'adjudicative decision' to impose permit conditions, but the permit conditions were imposed pursuant to Tigard's Community Development Code." *Id.*, at 413 n.* (Souter, J., dissenting) (citations omitted). In short, whatever the Court might have meant by referring to an adjudication, it cannot have meant there was no statute authorizing the exaction at issue.

A clearer, but parallel, distinction would be the one between *as-applied* and *facial* challenges. Though this Court has apparently never addressed the issue, the holding of *United States v. Salerno*[21] – by which facial challenges must demonstrate that a law is unconstitutional in all circumstances[22] – applies to the Takings

[21] 481 U.S. 739 (1987).

[22] *Id.*, at 745.

Clause. *See, e.g., Daniels v. Area Plan Comm'n of Allen County*, 306 F.3d 445, 466 (CA7 2001) (applying *Salerno* to takings claim); *Rent Stabilization Ass'n of City of New York v. Dinkins*, 5 F.3d 591, 595 (CA2 1993) (same). Elsewhere, the Court has said that a facial Takings Clause challenge looks to whether the "mere enactment" of the regulation has gone too far, *see Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 736 n.10 (1997), and that the court will look only to the law's "general scope and dominant features . . . leaving other [specific] provisions to be dealt with as cases arise directly involving them." *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 397 (1926).

By all of the above, *Dolan* is an awkward fit in the facial challenge context. The *Dolan* test requires the court to examine the impact caused by a *particular* plaintiff's development, the impact of the *specific* fee or dedication, and then issue a judgment as to whether the two are "roughly proportional." By definition, such an inquiry is far more fact-specific than an attempt to show that all applications are unconstitutional, much less that "mere enactment" constitutes a taking.[23] Thus, the *Dolan* test *inherently* works best for as-applied challenges.

The facial/as-applied distinction has a signal advantage over the legislative/adjudicative distinction: It is easy to administer. All the court need ask is whether the

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[23] Not that such a showing would be impossible – if a city passed an exaction ordinance that was sufficiently onerous, it might be possible to demonstrate that the exaction was not "roughly proportional" to any conceivable development. Such cases, however, would presumably be rare.

plaintiff has personally been subjected to an exaction, or whether the plaintiff is seeking to challenge the entire exaction scheme. There is no need to address difficult questions such as how to classify the commission that ordered the exaction, or how generally applicable the exaction might be, etc.

CONCLUSION

This Court has often said that takings claims usually involve "essentially ad hoc, factual inquiries." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992). It may be that *how* the Takings Clause applies is unavoidably ad hoc, but it should not be so as to *where* and *when* the Clause applies in the first place. If the Court declines to provide further guidance, lower courts will be left to apply an essentially ad hoc test, on an ad hoc basis, and often looking to whether an exaction was applied in an ad hoc manner. The Court should put a stop to this multiplication of ad hocery.

Respectfully Submitted,

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